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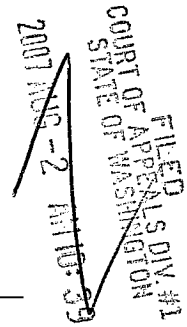

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. VANCE,

Appellant.

THIRD SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

I. ISSUES

What is the effect on this case of State v. Womac, ___ Wn.2d ___, 160 P.3d 40 (2007)?

II. STATEMENT OF THE CASE

The facts are set out in the respondent's previous briefs.

III. ARGUMENT

A. WOMAC DOES NOT AFFECT THE STATE'S ARGUMENT THAT THE EXCEPTIONAL SENTENCE WAS PROPERLY IMPOSED, BECAUSE IT WAS BASED SOLELY ON FACTS REFLECTED IN THE JURY'S VERDICT.

This court has directed the State to provide supplemental briefing on the impact of Womac. The respondent's Second Supplemental Brief raised essentially three arguments for affirming or remanding the sentence.[1] First, it argued that the sentence is constitutionally valid, because the jury found the facts necessary to support an exceptional sentence. 2nd Supp. Brief of Resp. at 5-12 (§ III.B.1.). Second, it argued that if the jury findings were insufficient, the error was harmless. Id. at 12-14 (§ III.B.2.). Third, it argued that if there was reversible error, the proper remedy was remand for a new sentencing hearing. Id. at 14-18 (§ III.C.1.).

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[1] The brief also mentioned that there was a pending petition for certiorari in In re Van Delft, 158 Wn.2d 731, 147 P.3d 192 (2005). Subsequently, the U.S. Supreme Court denied that petition.

The decision in Womac requires this court to reject the second of these arguments. In Womac, the court held that the trial court had erred in imposing an exceptional sentence based on facts that had not been found by the jury. Womac, ¶ 36. Because there was no legal procedure whereby the jury could have made the necessary findings, this error could not be harmless. Womac, ¶ 42.

The holding of Womac does not affect either of the State's other two arguments. In section III.B.1 of its Second Supplemental Brief, the State argued that the jury made all the findings necessary to support the exceptional sentence. The brief pointed out that the only necessary finding was that the defendant's multiple crimes resulted in "egregious effects." 2nd Supp. Brief at 6-7, citing State v. Hughes, 154 Wn.2d 118, 136-37, 110 P.3d 192 (2005). The jury made this finding when it found that the defendant had sexually molested four children. The defendant's brief provides no explanation of how someone can sexually molest children without harming them.

The defendant argues that the jury lacked the authority to make the necessary findings. Appellant's Supp. Reply Brief at 3-4. This ignores the critical circumstance in this case: that the verdicts themselves contained findings sufficient to support an exceptional

sentence. Obviously, the jury had the authority to determine whether or not the defendant was guilty of the crimes charged in the information. See CrR 6.16; RCW 10.612.060. The restrictions of Blakely only apply if the sentence exceeds the maximum that may be imposed "solely on the basis of the facts reflected in the jury verdict." Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Under the circumstances of this case, the facts reflected in the jury verdict support an exceptional sentence. Consequently, the imposition of such a sentence did not violate constitutional requirements. Womac says nothing to the contrary. The sentence should therefore be affirmed.

B. WOMAC DOES NOT ADDRESS WHETHER THE 2007 SRA AMENDMENTS REQUIRE REMAND FOR A JURY TRIAL ON ANY ADDITIONAL FACTUAL FINDINGS.

The Second Supplemental Brief alternatively argued that the case should be remanded for jury findings as to any necessary facts, pursuant to Laws of 2007, ch. 205. Womac does not discuss the impact of this statute. It only addresses the impact of the earlier SRA amendments set out in Laws of 2005, ch. 68. In this regard, Womac follows the analysis of Pillatos: because the 2005 statute required pre-trial notice, it did not allow the notice to be given on remand after appeal. Womac ¶ 41, citing State v. Pillatos, 159

Wn.2d 459, 470, 150 P.3d 1130 (2007). As the respondent's supplemental brief explains, this problem was corrected by the 2007 statute. 2nd Supp. Brief at 16, citing RCW 9.94A.537(2).

As the brief concedes, the 2007 statute does not specifically deal with the precise aggravating factor used in this case. Nonetheless, this court is authorized to "fill a minor gap in a statute" by "extrapolat[ing] from its general design details that were inadvertently omitted." Hughes, 1254 Wn.2d at 150-51. "This court has inherent authority to supplement statutory provisions by requiring additional procedures to satisfy the requirements of procedural due process." State v. Thorne, 129 Wn.2d 736, 769, 921 P.2d 514 (1996). The court will, however, refrain from exercising that authority when doing so would infringe on the legislature's intent. State v. Masangkay, 121 Wn. App. 904, 91 P.3d 140 (2004).

The Supreme Court's decisions dealing with sentencing procedures reflect this judicial restrain. In Hughes, the court was unwilling to create "from whole cloth" a new sentencing procedure. Hughes, 154 Wn.2d at 151. In Pillatos and Womac, the court refused to eliminate a procedural protection – pre-trial notice – that

the Legislature had created. Pillatos, 159 Wn.2d at 470; Womac ¶ 41.

The 2007 statute has now eliminated this rationale. "The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.' Laws of 2007, ch. 205, § 1. Nor has the legislature expressed any disapproval of the "multiple offenses" aggravating factor. To the contrary, that factor has been expanded and made easier to prove. Compare RCW 9.94A.533(2)(c) with former RCW 9.94A.535(2)(h). Following the enactment of chapter 205, refusing to allow a sentencing jury would no longer respect for the legislature's authority. Rather, it would be an evasion of the legislature's express intent. If the defendant's right to a jury trial has not been sufficiently respected, that problem should be corrected on remand.

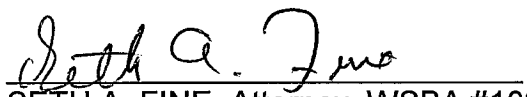
IV. CONCLUSION

For these reasons, as well as those set out in prior briefs, the exceptional sentence should be affirmed. Alternatively, the case should be remanded for a jury trial to determine the facts

necessary to support a conclusion that a standard range sentence would be "clearly too lenient."

Respectfully submitted on August 1, 2007.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: 

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:
The undersigned certifies that on the 1 day of August, 2007, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

THIRD SUPPLEMENTAL BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 1 day of August, 2007.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit